## X v Commonwealth
## High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 2 December 1999
## [1999] HCA 63

***Appellant discharged from army on account of HIV status - Discrimination alleged lawful - Application for order of review - Whether applicant must show a different result was inevitable or merely open if no error was made***

This was an application to the High Court for review of a Full Federal Court decision. The appellant was a former soldier who was dismissed from the Defence Forces after being diagnosed as HIV positive. Shortly after dismissal, the appellant lodged a complaint before the Human Rights and Equal Opportunities Commission ("the Commission") claiming that he had been unlawfully discriminated against by being discharged from the Defence Forces due to his HIV status (contrary to sections 5 and 15 of the *Disability Discrimination Act 1992*. The Commission found that the dismissal due to the soldier's HIV status was discriminatory.

The Commonwealth then applied to the Federal Court for an order of review under the *Administrative Decisions (Judicial Review) Act 1977* and for writs of mandamus and certiorari. The application was dismissed at first instance. However, the Full Court allowed the appeal.

Section 15(4) of the *Disability Discrimination Act 1992* provides a qualification that it is not unlawful to discriminate if the employee is unable to carry out the 'inherent requirements' of that particular employment. The Commonwealth submitted that the risk of infection to others means that an HIV infected soldier is not a suitable candidate for deployment. The inherent nature of the employment would mean the soldier could not carry out his job.

The Commissioner had rejected the Commonwealth's submission by drawing a distinction between 'inherent requirements' of employment and what he called 'incidents of employment'. The Commissioner held that deployment of a soldier to a specific location was an 'incident of employment' rather than an 'inherent requirement' of employment.

The majority of the High Court found that the distinction drawn between inherent requirements and incidents of the employment is one that section 15(4)(a) does not make. The inherent requirements of a particular employment are not confined to the performance of the tasks or use of the skills for which the employee is specifically prepared. It followed that the Commissioner had made an error of law in his decision.

The majority of the High Court considered that an employee must be able to perform the inherent requirements of a particular employment with reasonable safety to the individual concerned and to others with whom the individual will come in contact in the course of his employment. It was acknowledged that determining what is a 'reasonable' degree of risk to others in a context of training for participation in armed conflict will present difficult questions of judgment.

It was further noted by the High Court that an applicant for an order does not fail unless it is shown that a different result was inevitable. Showing that a different result might have been reached if there was no error of law made, may be sufficient reason to warrant making an order.

The appeal was dismissed as the High Court (4-2 majority) found the Full Court was right to set aside the decision of the Commissioner and remit the matter for further consideration by the Commission differently constituted.

## Re the Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham
## High Court of Australia, McHugh J, 21 January 2000
## [2000] HCA 1

***Refugee Review Tribunal decision refusing to grant protection visa—application in original jurisdiction of High Court for prerogative relief—whether Tribunal failed to take into account relevant considerations and evidence—whether Tribunal failed to consider all available inferences from evidence— whether s430(1) of Migration Act 1958 required Tribunal to refer to evidence contrary to its findings—role of the High Court under the Constitution***

This was an application in the original jurisdiction of the High Court under s75(v) of the Constitution, for prerogative relief against the Minister for Immigration and Multicultural Affairs, the Refugee Review Tribunal (RRT), and the principal member of the RRT. It concerned an RRT decision affirming that Mr Durairajasingham ("the prosecutor") was not entitled to a protection visa. The RRT had not accepted several important assertions made by the prosecutor and his wife on which the case was based. The prosecutor sought orders nisi for a writ of prohibition directed to the Minister, a writ of certiorari directed to the RRT, and a writ of mandamus directed to the principal member of the RRT as well as an injunction against him.

In his judgment, McHugh J discussed the role of the High Court, referring to *Abebe v the Commonwealth* (1999) 73 ALJR 584 which held that the severe restriction of the jurisdiction of the Federal Court to review the legality of the decisions of the RRT could have significant consequences for the High Court because it would force applicants for refugee status to invoke its constitutionally entrenched s75(v) jurisdiction.

The Court noted that these cases (of which there were many pending) created for the Court a tension between the need to give preference to the applications of those in